THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2005-0566, In the Matter of Linda A. Plaisted (now Manning) and Grahame J. Plaisted, the court on September 14, 2006, issued the following order:

The respondent, Grahame J. Plaisted, appeals the trial court's order denying his motion to modify his child support obligation and suspending the formal visitation schedule it had previously put in place. We affirm in part, vacate in part and remand.

We first address the respondent's assertion that the trial court erred by suspending the court's prior visitation schedule. We review the trial court's order for an unsustainable exercise of discretion. See In the Matter of Kosek & Kosek, 151 N.H. 722, 724 (2005). Under the unsustainable exercise of discretion standard, the respondent must show that the trial court's ruling was "clearly untenable or unreasonable to the prejudice of his case." State v. Lambert, 147 N.H. 295, 296 (2001). As the respondent has not demonstrated that he suffered any prejudice from the trial court's ruling on visitation, we uphold that ruling.

Although the respondent argues that the trial court "restricted" his visitation rights, the court's order does not state this. Nothing in the court's order indicates that the court restricted or in any way reduced the respondent's visitation rights.

While the trial court did not make an explicit finding that suspending its prior visitation schedule and leaving it to the parties to arrange visitation was in the children's best interests, the respondent "offered no evidence and made no allegation that [suspending] the visitation schedule was not in the best interests of the children." Kosek, 151 N.H. at 725. "In the absence of an explicit finding that the change in visitation was in the best interests of the children, and in the absence of any evidence or allegation to the contrary, we will assume that the trial court found that [suspending its] visitation schedule was not contrary to the best interests of the children." Id.

We next address the respondent's assertion that the trial court erred when it denied his motion to modify his child support obligation. Trial courts have broad discretion to review and modify child support awards. In the Matter of Donovan & Donovan, 152 N.H. 55, 58-59 (2005). They are in the best position to determine the parties' respective needs and their respective abilities to meet them. Id. Accordingly, we will set aside a modification order only if it clearly

appears on the evidence that the court's exercise of discretion was unsustainable. Id.

Under the child support statute, either parent may apply to the trial court to modify its child support order every three years or when there is a substantial change in circumstances. See RSA 458-C:7 (2004). In this case, the respondent sought a modification of a 2004 order. Thus, to obtain a modification, he was required to demonstrate that there had been a change of circumstances. See id.

In the 2004 child support order, the trial court imputed income to the respondent because it found that he was voluntarily unemployed when he voluntarily gave up "an excellent job and a substantial income." See RSA 458-C:2, IV (2004). For the purposes of this appeal, the respondent does not dispute this finding.

The respondent moved to modify his child support obligation three times in 2005. He filed the first such motion in March 2005, after he was terminated from a position that he held in January and February of that year. He filed his second motion to modify on April 11, 2005, when he had secured another position. He filed his third motion to modify on April 14, 2005, because, by that time, he had lost that position.

The respondent argued to the trial court that because he had been fired from his last two positions, he was no longer "voluntarily" unemployed, but was now "involuntarily" unemployed. Accordingly, he asserted, it was no longer appropriate for the court to impute income to him based upon the position that he left in 2004.

The trial court disagreed:

> As to child support, I addressed that subject sometime ago when I found that [the respondent] had voluntarily given up an excellent job with benefits and substantial income. The fact that [he] has obtained a job for three days or so and was discharged from the job does not change the situation. The subject matter of modifying child support would not be before me if [the respondent] had not willingly and voluntarily given up his previous permanent position. Accordingly, the request by the respondent for relief respecting child support is DENIED.

The basis for the trial court's decision is unclear. It appears that the trial court may have relied upon our decision in Noddin v. Noddin, 123 N.H. 73 (1983). In that case, we held that, in the context of a post-divorce request for modification of an existing child support order, the child support obligation should not be reduced where the obligor's wrongdoing resulted in the loss of high-

earning employment and the obligor owned an asset that could be applied to meet his or her obligations. Noddin, 123 N.H. at 76. In In the Matter of Rossino & Rossino, 153 N.H. ___, ___, 899 A.2d 233, 236 (2006), we recently clarified that RSA 458-C:2, IV(a) supersedes our decision in Noddin. We hereby vacate the trial court's decision and remand for further proceedings consistent with our opinion in Rossino.

For the above reasons, we affirm the trial court's decision with respect to visitation and vacate its decision with respect to child support modification. We remand for further proceedings consistent with this order. We hereby deny the appellee's motion to amend her brief to submit evidence that she did not submit to the trial court.

Affirmed in part; vacated in part; and remanded.

DALIANIS, DUGGAN and HICKS, JJ., concurred.

Eileen Fox,
Clerk